enter into contracts would be misplaced as the powers of corporations to make contracts vary according to the character of the corporation. A corporation created by statute for particular purposes can only make such contracts as it is expressly or by necessary implication empowered to make by the statute creating it [*Baroness Wenlock* v. *River Dee Company*(21), a decision of the Court of Appeal affirmed by the House of Lords (10 App. Cas. 354); *Attorney General* v. *Great Eastern Railway Company*(10)]. Contracts purporting to be made by statutory corporations which are outside the powers conferred by statute are *ultra vires* and void. The purpose of the doctrine of *ultra vires* is said to be to protect the body corporate and its constituents so that corporate funds will not be expended on activities of an unknown or speculative nature, and as Professor Gower illustrates, it ensures, for example, that an investor in a gold mining company does not find himself holding shares in a fried-fish shop.

I would also point out that the negation of any power to give a guarantee under the Act is amply borne out on a referential consideration of the provisions of section 33 of the Act which provide that co-operative societies may invest or deposit their funds in the manner and subject to the terms and conditions specifically provided therein. The giving of a guarantee does not of course amount to an investment or deposit of corporate funds but I would think that it is in effect an even more drastic commitment of the funds of a co-operative society attracting a substantially higher risk for which no specific statutory provision has been made, and I cannot see how a power of this nature can be said to be encapsulated in the nebulous and amorphous genus of 'transactions' mentioned in section 32 of the Act, a generalised and faceless term which would require to be construed in context within the ambit of the Act.

One further point. Any recourse in my view to the provisions of section 14(1)(a) of the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act, 1978 which empower the respondent to stand guarantee for any loan of money to any person whether or not a member of it, in support of the appellant's contention in this matter would be wholly misconceived as the guarantee in question in the matter before us was given on October 14, 1975, and section 3(b) of the 1978 Act categorically enacts that the provisions of that Act shall apply in relation to the respondent upon the commencement of that Act which was only passed in 1978 as a special measure to remedy the ills that plagued the respondent ere then and to make special provisions for its proper management and administration. Indeed the specific provisions of section 14(1)(a) of the 1978 Act in relation to the power of the respondent to stand guarantee would clearly manifest the fact that there was no such power hitherto under sections 8 and 32 of the Act as otherwise it would have been quite unnecessary to enact a specific enabling provision for this purpose, and this is wholly substantiated by the fact that section 14(1) of the 1978 Act empowers the respondent to perform the several acts and functions specified therein as its authorised business *in addition to* the powers, functions, duties and responsibilities conferred or imposed on it by the Ordinance (*scilicet*, the Co-operative Societies Ordinance, 1948 – since revised as the Act on August 18, 1983), the rules made thereunder and its by-laws. Neither the Ordinance nor the Act therefore gives any power to guarantee as contended on behalf of the appellant.

Appeal dismissed.

Solicitors: *Skrine & Co.; Nik Hussain, Ibrahim & Abdullah.*

TAN SHIANG SHONG v. TAN LEE CHOON & ANOR.

[S.C. (Abdul Hamid Ag. L.P., Mohamed Azmi & Syed Agil Barakbah S.C. JJ.) October 17, 1984 & April 20, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 247 of 1983]

Practice and Procedure – Limitation – Contract between beneficiaries for transfer of land registered in name of deceased – Land not transferred – No equitable interest in land – Contractual right – No action for 21 years – Action barred by limitation – National Land Code, ss. 340 & 417 – Limitation Act, 1953, s. 9(1) & 22.

Limitation – Action barred – Limitation Act, 1953, ss. 9(1) & 22.

In this case there was a contract between the beneficiaries to the estates of two deceased persons to transfer certain lands which was still registered in the name of the deceased. There was no contract of sale, no purchase money was paid and no possession of the said land was given to the appellant. Only the extracts of title were handed over. The appellant took no action to acquire possession of the land but waited 21 years to file the action for specific performance. The learned trial judge dismissed the action as being statute-barred. The appellant appealed.

Held: the appellant had not acquired any equitable interest in the said land which would have entitled him to convert to a real right or right *in rem* by registration of the title-deeds in his name under the Land Code. All that the appellant had was a right *ex contractu* to sue the respondents for breach of contract. This remedy was barred by section 9(1) of the Limitation Act.

Cases referred to:

(1) *Othman & Anor.* v. *Mek* [1972] 2 M.L.J. 158.
(2) *Bachan Singh* v. *Mahinder Kaur & Anor.* [1956] M.L.J. 97.
(3) *Williams* v. *Greatrex* [1957] 1 W.L.R. 31, 36.

SUPREME COURT.

G. Sri Ram for the appellant.
S. Sivasubramanian for the 1st respondent.
Dato' Morris Edgar for the 2nd respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): In this appeal, the appellant is dissatisfied with the decision of the learned Judge of the High Court, Raub, in dismissing his claim against the respondents with costs. In the court below, he claimed specific performance of an agreement executed between him on the one part and the first respondent and one Tan Poon Pin (since deceased) on the other part for conveying two pieces of land, damages and alternatively for delivery of possession and ownership of the said land to him. The main ground for the dismissal was because the plaintiff's claim was barred by the period of limitation under section 9(1) of the Limitation Act, 1953. Before us, the same issue was argued and two related issues involving equitable principles were also submitted.

The uncontroverted facts as accepted by the trial Judge were that the appellant, the first respondent and Tan Poon Pin (Tan) are cousins and beneficiaries of certain estates. They had disputes over some family property and decided to make an amicable settlement by executing an agreement (Exhibit P.2). The recitals to the said agreement explained the position very clearly:

"This Agreement is made January, 31, 1951, between *TAN LEE CHOON* of No. 90, Jalan Kanaga, Kuala Lumpur, and *TAN POON PIN* of No. 68, Loke Yew Road, Kuala Lumpur, of the one part and TAN SHIANG SHONG of No. 17, Main Street, Jerantut, of the other part:

Whereas the said Tan Lee Choon and Tan Poon Pin are the sons of Tan Yew (deceased) and beneficiaries of the Estate of the said Tan Yew deceased:

And whereas the said Tan Shiang Shong is a son of Tan Gam (deceased) and beneficiary of the Estate of the said Tan Gam, deceased:

And whereas certain disputes have arisen between the said Tan Lee Choon and Tan Poon Pin and Tan Shiang Shong with regard to the disposition of certain properties belonging to the said Tan Yew, deceased, and Tan Gam deceased as embodied in a Chinese Agreement made in 1925:

And whereas the parties hereto have amicably settled all their disputes once and for all relating to the properties belonging to the said Tan Yew (deceased) and Tan Gam (deceased) on the following terms and conditions:"

Under clause 1, the appellant renounced all his rights and claims against the first respondent and Tan in respect of the properties left by Tan Gam (deceased) in consideration of the payment of $7,000/- and the transfer of 18 acres 1 rood 20 poles of rubber lands by them to him. The $7,000/- were to be paid in instalments as provided under clause 2. Under clause 3 of the agreement, the first respondent and Tan agreed to transfer two other pieces of land held under E.M.R. Nos. 501 and 516 Lots Nos. 588 and 589 respectively, Mukim of Pedah, District of Kuala Lipis, Pahang (the said lands), to the appellant as soon as they became the registered proprietors thereof. Clause 4 provides that on the execution of this agreement, the appellant was entitled to possession and enjoyment of the profits and income derived from the said lands. The said agreement had been partly performed by the first respondent and Tan by the payment of $7,000/- after what seemed to have been protracted for some reason or other resulting in a court action at the instance of the appellant and ending in amicable settlement by the payment of the full amount. It was the second part of the agreement relating to the transfer of the said lands to the appellant that had not been fulfilled by the first respondent and Tan. It was also alleged that they had not handed over possession of the said lands under clause 4, but handed only the extracts of titles thereof on the execution of the said agreement. According to the appellant, some time in 1957 he received a letter from the respondents' solicitors which states as follows:

"January 8, 1957.

Mr. Tan Shiang Shong,
No. 12, Main Street,
Jerantut.

Dear Sir,

We are instructed by Messrs. Tan Lee Choon and Tan Poon Pin of Kuala Lumpur to refer you to the Agreement dated January 31, 1951, made between you and our

clients and to request you to call at our office during working hours within one (1) week from date hereof to complete the transfer in your favour as stipulated in the said Agreement.

Also bring along with you the extracts in respect of the lands held under E.M.R. Nos. 501 and 516 Mukim of Pedah which are in your possession to enable us to prepare the transfer thereof.

Yours faithfully,
Sd. Au-Yong Brothers."

When he presented himself at the solicitors' office, he was told to come back in a few days' time; subsequently when he went, he was informed that nothing could be done as the first respondent and Tan had failed to turn up. Tan passed away in 1977 and thereafter the appellant said he was asked to go to another solicitor in Temerloh for the same purpose, but again the first respondent failed to turn up. In spite of making several requests for the transfer of the said lands, the respondents had failed to do so.

The learned Judge held that the claim fell squarely within the ambit of section 9(1) of the Limitation Act being a claim to recover land and the period of limitation was twelve years from the date on which the right of action accrued to the appellant. He also held that such period began to run when the appellant's right under the agreement was infringed some time in 1957 when the first respondent and Tan failed to turn up at the lawyer's office pursuant to the letter stated above. He further held that the appellant had waited for about 21 years to file this action which was clearly statute barred. The appeal proceeded on the premise that the agreement (P.2) was valid.

It was submitted by counsel for the appellant that the Judge had failed to deal with the provision of section 22 of the Limitation Act although that was submitted during the proceeding. He submitted that this was a claim by a beneficiary under a trust to recover trust property in the possession of the trustee. According to him, the relationship between the parties as evinced by the facts and circumstances showed by implication a constructive trust, *i.e.* that the first respondent and Tan in his lifetime, were holding the said lands in trust for the appellant until the condition as stated in clause 3 of the agreement was fulfilled. Section 22 states:

"(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action –

. . . . .

(b) to recover from the trustee property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

(3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence."

We do not consider that this argument can serve any useful purpose. First, there is nothing to show in the pleadings that this is an action by a beneficiary under a trust in the absence of any averment and/or prayer for a declaratory order for the purpose. Secondly, the question whether it is a constructive trust and whether the issue actually falls under the provision of section 22 has not been properly argued before us and no authorities in support of the counsel's argument have been cited. We are of the view that in order to apply the statutory exception of the section it is necessary to show that a trust exists *viz.* that the property is subject to a trust and a person has entered into possession or received the rent of that property with full notice of the trust thus showing a fiduciary capacity. (*Halsbury*'s Laws of England, 4th Ed. Vol. 28 page 375 para 842). Whether or not a trust has commenced is a question of fact. In this case, we do not think any constructive trust has been created. If at all there was such a trust, the claim is again statute barred since the limitation period of six years has lapsed after having accrued when the interest in the property fell into the possession of the first respondent and Tan *vide* Order of Court dated November 9, 1954. (See page 17A of the record). It granted leave to the first respondent to distribute and transfer the properties of the estate of Tan Yew (deceased) including the said land to himself and Tan.

It was also submitted that even if the limitation period had set in, it was the appellant's remedy only that had been barred by statute but his right to the said lands was nevertheless enforceable. The basis for this proposition is the principle that statutes of limitation are rules of procedure which bars the remedy but not the right. It means only

the contractual remedy is barred but not the equitable rights. (See 24 *Halsbury*, 3rd Edition page 57). The principle was discussed by this Court in *Othman & Anor.* v. *Mek*[1] and among other cases *Bachan Singh* v. *Mahinder Kaur & Anor.*[2] and *Williams* v. *Greatrex*[3] were referred to. *Othman's case* related to a contract for the sale of land in which the original purchaser pleaded the contract, full payment of the agreed purchase price and possession of the land and title deeds which were handed to him by the vendor. Subsequently he filed a claim for specific performance of the agreement to transfer the land to him. The facts in *Williams* v. *Greatrex* were also similar. There the purchaser of two housing lots paid the deposits towards the purchase price and went into possession pursuant to the contract which provided that on payment of the balance of the purchase price the vendor would execute a proper conveyance. The purchaser having occupied the land made certain improvements. The vendor subsequently ordered the purchaser off the land, but the latter held on by putting up and making use of a garage thereon. Subsequently the vendor entered into an agreement to sell the land to a third party. The purchaser then brought an action against the vendor for specific performance of the contract. The facts in *Bachan Singh's case* are also similar. In all these cases, there was a contract for the sale of land between the purchaser and the registered owner thereof; either the full purchase price or part of the purchase price had been paid by the purchaser to whom the owner handed possession of the said land and the documents of title thereof. The purchaser entered into possession of the land pursuant to the terms of the contract. It remained for the vendor to keep to his part of the contract by transferring the said land and have it registered in the name of the purchaser.

In *Bachan Singh's case,* Thomson J. (as he then was) explained the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. On page 98, he said "where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is a right *in personam*. In other words, he has acquired a right to the land as against the vendor personally but not as against the world as a whole, and in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code." Thereafter his title becomes indefeasible under section 340 of the National Land Code.

The real point was that when the contract was made, the purchaser acquired a right *ad rem* or *in personam* to the land. In so far as the vendor is concerned, he is entitled to have it created into a real right. That is possible because every condition in the agreement has been fulfilled in particular payment of the purchase price and taking possession of the land, leaving only the condition to have the land transferred to the purchaser under the Land Code that remained to be done. In our view, that is an equitable right as held by this court in *Othman's case* and not "merely a legal right of the nature of a chose in action" as held by Thomson C.J. in *Bachan Singh's case.* We find support in *Williams* v. *Greatrex* in which Denning L.J. (as he then was) said:

> "..... once the purchaser went into possession of the land, having the contractual right to be there, he not only had an equity to be there, but also the benefit of a contract to sell him these two plots. That was not only an equity; it was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he does not lose his rights simply by not proceeding at once to specific performance."

The facts in the appeal before us are clearly distinguishable. There was a contract between the beneficiaries to the estates of two deceased persons to transfer the said land and at the material time when the agreement was signed the said land was still registered in the name of the deceased Tan Yew. There was no contract of sale between purchaser and registered owner, no purchase money was paid and most important, no possession of the said land ever passed to the appellant in spite of clause 4 of the agreement. Only the extracts of title were handed over. He took no action to acquire possession thereof, but as stated by the learned Judge waited for 21 years to file the action. He had therefore failed to fully execute the contract. In our considered judgment, by his failure to do so the appellant had not acquired any equitable interest in the said land, *i.e.* a right *ad rem* which would have entitled him to convert to a real right or right *in rem* by registration of the title deeds in his name under the Code. All that the appellant had was a remedy *ex contractu* to sue the respondents for breach of contract. It is that remedy which is barred by section 9(1) of the Limitation Act. In contrast with *Bachan Singh's case,* this is a claim based on a contract and not under section 417 of the National Land Code. The section states:

> "(1) The Court or a Judge may by order direct the Registrar or any Collector to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty

of the Registrar or Collector to comply with the order forthwith."

The appellant has failed to establish a substantive right to the said land, and in the circumstances has not succeeded in satisfying us of his entitlement to be placed in the register under the provision of the section.

For the reasons stated above, we dismiss the appeal with costs and confirm the judgment of the learned Judge.

Deposit is to be retained on account of taxed costs.

Appeal dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Clough Thuraisingham, Sivasubramaniam & Ramdas; Morris Edgar & Paul Raj.*

WONG CHOON MEI & ANOR. v. DR. KULDEEP SINGH & ANOR.

[S.C. (Lee Hun Hoe C.J. (Borneo) Seah & Syed Agil Barakbah S.C. JJ.) October 30, 1984 & April 20, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 89 of 1984]

Tort – Negligence – Professional negligence – Person injured after assault treated in Casualty Department of Hospital – X-Rays taken – Person sent home but died the same evening – Internal bleeding from ruptured spleen – Liability of medical officer – Res ipsa loquitur – Rebuttal by proof that medical officer not negligent – Action dismissed by judge – No assessment of damages.

Evidence – X-Rays stated to be misplaced – No independent evidence called – Whether secondary evidence admissible – Evidence Act, 1950, ss. 61-65.

In this case a person had been assaulted and had sustained injuries. He was brought to the Casualty Department of the General Hospital where he was examined by the first respondent. After a physical examination, X-Rays were taken of his right elbow and chest. The X-Rays revealed two fractures of the elbow and the clavicle but the first respondent detected no fractured rib nor did he find the presence of any fluid in chest or abdomen. The person was sent home that same evening. He died fifteen hours or so later and the post-mortem revealed that the cause of death was shock due to internal bleeding from a ruptured spleen brought about by the fractures to his 8th, 9th and 10th left ribs. The appellants sued the respondent for negligence in failing to properly examine or diagnose the extent of the deceased's injuries or prescribe the proper and appropriate treatment. The respondents denied that they were in any way negligent and claimed that the first respondent had done all that was medically necessary to treat the deceased. They stated that the injuries that caused his death were not evidenced from the X-Rays films taken of the deceased. The action was dismissed by the trial judge and the appellants appealed.

Held (Seah S.C.J. dissenting): (1) when a *prima facie* case of negligence against a defendant has been established under the doctrine of *res ipsa loquitur*, the defendant can rebut that case by proving he was not negligent, even though he cannot prove how the accident happened. If the defendant can show a way in which the accident may have occurred without negligence the cogency of the fact of the accident itself disappears and the plaintiff is left as he began, namely that he has to show negligence. If the defendant gives a reasonable explanation which is equally consistent with the accident happening without his negligence as with his negligence he has again shifted the burden of proof back to the plaintiff;

(2) a consideration of the evidence in this case negatives any suggestion of negligence on the part of the first respondent and therefore on the particular facts of this case *res ipsa loquitur* does not apply;

(3) the learned trial judge in this case should have made an assessment of the damages. If no assessment were made and the appeal was allowed, it would mean that the case has to be sent back to the learned judge for assessment. This would cause unnecessary delay, inconvenience and costs.

Cases referred to:-

(1) *Roe* v. *Ministry of Health & Ors.* [1954] 2 All E.R. 131, 136.
(2) *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (1874-75) 2 I.A. 87, 102.
(3) *Vincent* v. *Cole* 173 E.R. 1151.
(4) *Strother* v. *Barr* 130 E.R. 1013, 1018.

SUPREME COURT.

G. Varaghese for the appellants.

P.M. Mahalingam, (Senior Federal Counsel), for the respondents.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo): This is an appeal against the dismissal by the learned Judge of a claim in negligence. The appellants/plaintiffs were the parents of Wong Yoke Thong (deceased) and sued as dependants of deceased pursuant to section 7 of the Civil Law Ordinance, 1956. The 1st respondent/1st defendant was a doctor attached to the Casualty Department, General Hospital, Kuala Lumpur and employed by the 2nd respondent/2nd defendant.